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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re F.R., a Person Coming Under the
Juvenile Court Law.

MARIN COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.M. et al.,

Defendants and Appellants.

A155205

(Marin County
Super. Ct. No. JV26532A)

In this dependency proceeding involving minor F.R., a boy born in fall 2017, the juvenile court denied reunification services to both of the minor's parents, K.M. (Mother) and F.R., Sr. (Father), and set a selection and implementation hearing under Welfare and Institutions Code section 366.26.¹ Prior to the section 366.26 hearing, Mother filed a petition under section 388 asking the court to change its order denying her services and to provide her with reunification services. The court denied the section 388 petition and, after conducting a section 366.26 hearing, terminated Mother's and Father's parental rights.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

On appeal, Mother argues the court erred by denying her section 388 petition without holding an evidentiary hearing on the petition. She contends this error requires reversal of both the order denying her section 388 petition and the subsequent order terminating her parental rights. Father also has appealed, arguing that, if the order terminating Mother's parental rights is reversed, then the order terminating his parental rights must be reversed as well. The sole focus of the appeal thus is whether the court should have held an evidentiary hearing on Mother's section 388 petition. Neither parent raises any independent challenge to the juvenile court's decision to terminate parental rights. We conclude the court did not abuse its discretion by declining to hold an evidentiary hearing on the section 388 petition, so we affirm the challenged orders.

I. BACKGROUND

We discussed the underlying dependency proceedings for F.R. in our July 5, 2018 unpublished opinion addressing Father's petition for extraordinary writ relief under section 366.26, subdivision (l) and California Rules of Court, rule 8.452.² (*F.R. v. Superior Court* (July 5, 2018, A153983) [nonpub. opn.].) As we noted there, the juvenile court, at a combined jurisdiction/disposition hearing on March 21, 2018, denied reunification services to both parents. As to Mother, the court denied services pursuant to section 361.5, subdivision (b)(13), based on Mother's extensive history of substance abuse. The court set a section 366.26 hearing for July 16, 2018.

Each parent filed a notice of intent to file a writ petition challenging the court's order denying services and setting a section 366.26 hearing, but only Father filed a writ petition and we therefore dismissed the writ proceeding as to Mother. We later denied Father's writ petition on the merits.³

² The record for that writ proceeding has been incorporated into the record for the present appeal.

³ In her opening brief in the present appeal, Mother incorrectly states that, in the prior writ proceeding, she filed a writ petition that was denied on the merits.

In reports submitted prior to the section 366.26 hearing, the Marin County Health and Human Services Agency (the Agency) recommended that the court terminate Mother's and Father's parental rights and select adoption as F.R.'s permanent plan. The social worker wrote that, while it was apparent that Mother and Father loved F.R., they were unable to meet his daily needs. The Agency stated that F.R., a "curious and healthy toddler," was generally adoptable.

After continuances, the contested section 366.26 hearing was held on August 22, 2018. The day before the contested hearing, on August 21, 2018, Mother filed a section 388 petition asking the court to change its March 21, 2018 order denying her reunification services and to order that she be provided with services.⁴ The petition and attached documents stated Mother had participated in a residential substance abuse treatment program from February to May 2018 and had graduated to outpatient care; she was residing in a sober living environment and had a sponsor; and she was visiting F.R. regularly. The petition alleged it would be in F.R.'s best interest to be with Mother or with other biological relatives. Counsel for the Agency filed a written response, asking the court to deny the petition on the ground it did not set forth a prima facie showing of changed circumstances or that the proposed change (offering services to Mother and thus delaying permanency for F.R.) would be in F.R.'s best interest.

At the August 22, 2018 hearing, the court began by addressing Mother's and Father's section 388 petitions. The court stated it had reviewed the parties' written submissions and asked if any counsel wished to add anything. Mother's and Father's counsel argued they had made a sufficient showing in their section 388 petitions to warrant an evidentiary hearing. Mother's counsel stated her section 388 petition showed changed circumstances because it reflected Mother had completed the residential treatment program and was continuing to participate in treatment. The Agency's counsel

⁴ Father also filed a section 388 petition, but on appeal he does not contend the court erred by denying it.

submitted on her written response, and F.R.'s counsel stated she agreed with the Agency that no prima facie showing had been made to warrant holding an evidentiary hearing.

The court stated it had "reviewed the entire history of the file" to determine whether there had been a significant change of circumstances after it entered the order denying services. The court noted Mother had completed a treatment program and said this was "excellent," but the court emphasized that Mother's substance abuse problems had gone on for decades. The court stated there had been numerous prior efforts to address the problems, some of which "may have worked in the short term, but they certainly didn't have any long-lasting change on your life." The court stated it hoped the recent changes would be long-lasting, but concluded "they're too new for me to consider them significant." The court found Mother's recent progress was "too little too late to be a significant change." The court denied the section 388 petitions and proceeded to conduct the section 366.26 hearing.

In a written order denying Mother's section 388 petition, the court stated (consistent with its oral comments at the hearing): "Substance abuse has been an issue for Mother for many years and she has not acted diligently and is in early stages of sobriety." The court concluded Mother had not made a prima facie showing of a change of circumstances or that the proposed change (offering services to Mother) would be in F.R.'s best interest.

After the contested section 366.26 hearing, at which the court heard testimony from the social worker, Mother and Father, the court terminated the parental rights of both parents and selected adoption as the permanent plan for F.R.

II. DISCUSSION

Under section 388, a parent may petition to modify a prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(1); see Cal. Rules of Court, rule 5.570(a).) The juvenile court shall order a hearing where "it appears that the best interests of the child . . . may be promoted" by the new order. (§ 388, subd. (d).) "Thus, the parent must sufficiently allege *both* a change in circumstances or new evidence and

the promotion of the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.)

"A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. [Citations.] It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. [Citations.] While the petition must be liberally construed in favor of its sufficiency [citations], the allegations must nonetheless describe specifically how the petition will advance the child's best interests." (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1157.)

In determining whether the petition makes the required showing, the court may consider the entire factual and procedural history of the case. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.) We review a juvenile court's decision to deny a section 388 petition without an evidentiary hearing for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Here, after considering Mother's section 388 petition and the history of the case, and after hearing oral argument, the court concluded Mother had not made a prima facie showing of a change of circumstances or that the proposed change would be in F.R.'s best interest. The court did not abuse its discretion by concluding Mother had not established a prima facie case warranting an evidentiary hearing.

First, the court reasonably could conclude that the information and allegations in Mother's section 388 petition and the attached documents (as supplemented by counsel's oral argument) did not establish a prima facie showing of a change of circumstances or new evidence. As noted, Mother's petition stated Mother had participated in a residential substance abuse treatment program from February to May 2018 and had graduated to outpatient care, was residing in a sober living environment and had a sponsor, and was visiting F.R. regularly. These actions were commendable and encouraging, as the court recognized. But the court appropriately considered Mother's recent progress in the context of her decades-long struggle with substance abuse, a history that was reflected in the dependency case record before the court.

The reports filed in F.R.'s case, including the disposition report filed in March 2018, described Mother's extensive history of drug use. Mother, who was 43 years old when the disposition report was filed, began using drugs at age 13. Mother acknowledged having a longstanding substance abuse problem. She had participated in at least four prior substance abuse treatment programs with some short-term success but had not succeeded in maintaining sobriety after leaving the programs. Mother had received extensive prior services in connection with dependency proceedings involving her older children, with whom she did not reunify. She admitted to methamphetamine use throughout her pregnancy with F.R., and both Mother and F.R. tested positive for amphetamines at the time of his birth.

In this context, the court reasonably could conclude that Mother's recent efforts to address her substance abuse problem did not constitute a change of circumstances or new evidence providing a basis for relief under section 388. Mother had participated in treatment before but had not managed to achieve long-term change. Mother suggests her recent voluntary participation in treatment was different from prior attempts that were court-ordered, but the court was not required to take that view. Instead, the court reasonably could conclude that Mother's "nascent work" on her longstanding substance abuse problem did not represent changed circumstances. (See *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [parent had chronic substance abuse problem and history of relapses; her "recent sobriety reflect[ed] 'changing,' not changed circumstances"].)

Second, based on the record before it and even liberally construing Mother's section 388 petition, the court reasonably could conclude the petition did not present a prima facie showing that providing reunification services to Mother would be in F.R.'s best interest. The petition stated that Mother had bonded with F.R. through visits and had demonstrated her commitment by participating in substance abuse treatment. The petition also stated it was in F.R.'s best interest to be with biological relatives.

But as discussed, Mother's recent participation in treatment did not show a likelihood that she would be able to maintain sobriety over the long term, especially in light of her history of prior treatment programs and subsequent relapses. The petition's

allegations on this point did not show that providing services aimed at allowing Mother to reunify with F.R. would be in his best interest. And in light of the stage of the proceedings, the court was not required to give significant weight to Mother's visitation with F.R. or her desire that he be placed with biological relatives.

To the contrary, because Mother's section 388 modification petition was filed several months after reunification services had been bypassed, "the goal of family reunification [was] no longer paramount, and ' "the focus [had] shift[ed] to the needs of the child for permanency and stability" [citation], and in fact, there [was] a rebuttable presumption that continued foster care [was] in the best interests of the child.' " (*In re K.L.* (2016) 248 Cal.App.4th 52, 62.) The trial court properly prioritized F.R.'s need for stability and permanency when it assessed Mother's section 388 petition. Granting Mother's petition would have delayed selection of a permanent home and would not have served F.R.'s best interests. (See *In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 224.)

III. DISPOSITION

The juvenile court's orders denying Mother's and Father's section 388 petitions and terminating Mother's and Father's parental rights as to F.R. are affirmed.

STREETER, Acting P.J.

We concur:

TUCHER, J.

BROWN, J.

A155205/*In re F.R.*